In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 662

CITIES SERVICE OIL COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 12-15) is not yet officially reported.

JURISDICTION

The judgment of the Court of Claims was entered on December 5, 1950. Petitioner's motion for a new trial, filed on December 26, 1950 (R. 16), was denied on January 9, 1951 (R. 16). The petition for a writ of certiorari was filed on April 6, 1951. The jurisdiction of this Court is invoked under 28 U. S. C. 1255.

QUESTION PRESENTED

Whether a contract price for "such quantities [of oil] as may be ordered by the Government during the period beginning 1 April 1947 and ending 30 June 1947" applies, as petitioner unsuccessfully contended below, only to oil ordered and delivered during those months, or to all oil ordered during that period and delivered within a reasonable time thereafter, as the Court of Claims held.

CONTRACT INVOLVED

The pertinent provisions of Department of the Navy Contract N7sx-250 are set forth in the Statement, *infra*, pp. 3-4.

STATEMENT

On February 18, 1947, petitioner received the following communication from the Navy (Fdng. 2, R. 3-4):

> Quotation Requested Attention Symbol SPD-3 For All Or Any Part of Navy's Second Quarter 1947 Requirement of Diesel Fuel Oil and Navy Fuel Oil Special As Follows: 1,350,000 Bbls Navy Fuel Oil Special Meeting Navy Dept Spec 7-0-1g Dated 2 April 1945 And 360,000 Bbls Navy Diesel Fuel Oil Meeting Navy Dept Spec 7-0-2e Dated 15 May 1945 Delivered FOB Vessels at Supplier's Works During The Period 1 April Thru 30 June 1947 X Receipt of Quotation By 3 March 1947 Will Be Appreciated X

On March 5, petitioner informed the Navy that it would furnish one cargo a month at a given price

—a cargo being the quantity of fuel oil, approximately 115,000 barrels, that could be lifted by one tanker ((Fdng. 2, R. 4). On March 14, petitioner was advised that a contract would be placed with it, to be numbered N7sx-250 (Fdng. 2, R. 4). On March 21, the Navy notified petitioner that (Fdng. 2, R. 4):

> You Awarded Contract N7SX-250 for 345,000 Bbls. Navy Diesel Fuel Oil, U. S. Navy Department Specification 7-0-2e, Dated 15 May 1945 At $2.1525 Per Bbl. F.O.B. Tankers And/Or Barges At Your Works, Lake Charles, La., In Such Quantities As May Be Ordered By The Government During The Contract Period 1 April Through 30 June 1947.

Thereafter, Contract N7sx-250, dated March 20, was executed by the parties. In pertinent part, it states as follows (Fdng. 4, R. 5-6):

I. Supplies To Be Furnished and Price

The supplies to be furnished hereunder and the prices thereof are as follows:

Item	Description	Estimated quantity (barrels)	Price per barrel	Estimated total
1	Navy Diesel fuel oil....	345,000	$2.1525	$742,612.50

II. Quantities

The quantities above set forth are estimates only. The amounts which the Contractor may be required to furnish and the Government to accept hereunder, shall be the amounts which

shall from time to time be ordered hereunder by the ordering officer during the period of this contract. In any event, however, the Government shall order supplies hereunder having an aggregate value at the above unit price of not less than $100.00, and the Government shall be entitled to order and the Contractor shall be required to furnish supplies hereunder not in excess of the quantity designated for any item. If the Government orders and the Contractor, at its option, furnishes more than the foregoing maximum amount, the total quantity ordered and furnished shall be treated for all purposes as having been ordered and furnished under the terms of this contract and payment therefor shall be made at the applicable unit contract price or prices in effect on the date of delivery.

III. Deliveries

The supplies to be furnished hereunder shall be delivered f.o.b. tankers and/or barges at Contractor's works, Lake Charles, Louisiana, *in such quantities as may be ordered by the Government during the period beginning 1 April 1947 and ending 30 June 1947.* Deliveries shall be made upon 3 days' notice. [Emphasis added].

On May 24, the Navy took delivery of 121,155.99 barrels of fuel oil, for which petitioner was subsequently paid the contract price (Fdng. 5, R. 6). As to this cargo, there is no dispute here.

On June 6, petitioner was advised that the tanker

S. S. Fort Frederica would lift a second cargo of oil between June 17 and 19. The ship was delayed and did not arrive at the loading point, Lake Charles, Louisiana, until July 23. Petitioner, however, was notified from time to time of the delay and made no protest until July 22 (Fdngs. 5, 6, R. 6-8; Def. Ex. 7).

On June 11, the Navy sent petitioner the following message (Fdng. 5, R. 6):

> Order Is Hereby Placed For the Remaining Cargo Of Diesel Fuel Oil Under Contract N7SX-250 EX Lake Charles, Louisiana X Vessel Will Be Nominated At A Later Date X

On June 18, petitioner was informed that the tanker S. S. Fort Massaic would lift this cargo on July 20. On June 23, petitioner was further advised that the tanker S. S. Port Republic was substituted for the Fort Massaic, and that the Port Republic would be ready for loading on July 18. The Port Republic did not arrive at Lake Charles until July 29 (Fdng. 5, R. 7).

On July 11, an officer of the Navy telephoned petitioner concerning the possibility of substituting another ship for the Port Republic, and was then informed by an agent of petitioner that he did not know whether petitioner would load any ships in July at the contract price. On July 22, petitioner notified the Navy that while it would have loaded the tankers at the contract price had they been presented for lifting early in July, the market price

had advanced substantially and petitioner would now supply the oil only at the prevailing market price. In reply, the Navy insisted upon delivery at the contract price (Fdng. 6, R. 7-8; Def. Ex. 7). On July 23, it was agreed to load the tankers without prejudice to the right of both parties in order to avoid delay and demurrage (Fdng. 7, R. 9).

The contract price was $2.1525 per barrel. Petitioner's posted price for spot sales had increased to $2.52 per barrel by June 16, and to $2.625 per barrel by July 10. Its posted price from July 10 to July 30 remained at $2.625 per barrel, which was also the prevailing open market price. The Navy, however, had other existing contracts in early July, under which it could have obtained oil at a price of $2.52 per barrel (Fdng. 9, R. 9).

Pursuant to the agreement reached on July 23, the tankers were loaded with 230,092.58 barrels of oil. Petitioner thereafter submitted invoices for a total sum of $603,993.03, at the price of $2.625 per barrel, but was paid $495,274.28, at the contract price of $2.1525 per barrel (Fdng. 8, R. 9). On October 30, petitioner wrote the Secretary of the Navy requesting payment of $108,718.75, representing the difference between the contract price and the market price of the oil delivered in July (Fdng. 11, R. 10). On December 18, the Contracting Officer of the Bureau of Supplies and Accounts of the Navy denied petitioner's claim (Fdng. 11, R. 10-11). On January 16, 1948, petitioner took an appeal

to the Navy Board of Contract Appeals from the contracting officer's findings—which are set out in Finding 11 (R. 10-11)—stating that the appeal was not to be considered as a concession of the jurisdiction of the Board of Contract Appeals and that it was without prejudice to such legal action as petitioner might pursue.[1] That appeal is still pending (Fdng. 12, R. 11-12).

On May 26, 1948, petitioner instituted this proceeding in the Court of Claims to recover the sum in dispute. The court below held, after examination of the pertinent documents, that, taken literally, the invitation for bids supports petitioner's argument that the contract applied only to oil delivered during April, May, and June, while the notification of award and the formal contract supports the Government's position that the contract permitted the Navy to order oil during those months and to take delivery within a reasonable time thereafter (R. 14). Resorting to other evidence to ascertain the intention of the parties in order to resolve the

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[1] Section 20 of the General Provisions of Contract N7sx-250 provides:

> Section 20.—*Disputes*
>
> Except as otherwise specifically provided in this contract, all disputes concerning questions of fact which may arise under this contract, and which are not disposed of by mutual agreement, shall be decided by the contracting officer, who shall mail to the Contractor a written notification of his determination. Within 30 days from said mailing the Contractor may appeal to the Secretary of the Navy, whose decision shall be final and conclusive upon the parties. Pending decision of a dispute hereunder the Contractor shall diligently proceed with the performance of this contract.

ambiguity thus presented, the court found that the Navy had for many years made similar contracts with oil suppliers, including petitioner, and that fairly frequently the oil contracted for was ordered within the period named in the contract and delivery taken after that period without protest by the suppliers (Fdng. 10, R. 9-10). Holding that petitioner's conduct in the instant case showed recognition of the custom, the court dismissed petitioner's claim (R. 15).

ARGUMENT

It is apparent from an examination of the opinion below and the arguments advanced by petitioner that this case turns on its own particular facts, and that no general question of importance is presented. The dispute depends on the purely factual question whether the parties intended the contract price to be applicable only to oil of which the Navy took delivery during the months of April, May, and June, 1947, or to all oil ordered by the Navy during that period and lifted within a reasonable time thereafter. We submit that this question was correctly decided by the court below on the evidence before it, and that further review is not warranted.

The court below found, and petitioner here acknowledges, that the contract is ambiguous as to whether the contract price applies to oil delivered after June, 1947. Accordingly, it was necessary and proper for the court to resort to other evidence to ascertain the intention of the parties, and peti-

tioner does not suggest otherwise. Petitioner asserts, however, that the court erred in resorting to evidence of usage since the ambiguity allegedly is clearly explained by the negotiations leading to the formal contract. Admittedly, the invitation to bid, if read literally, supports petitioner's position that delivery was to be accomplished during the months of April, May, and June. On the other hand, the notice of award, which preceded the contract and which was not objected to by petitioner, equally clearly expresses the contrary intention that the contract would apply to "such quantities as may be ordered by the Government during the contract period 1 April through 30 June 1947" (Fdng. 2, R. 4). Taken together, the invitation to bid and the acceptance of petitioner's offer themselves present an ambiguity which requires resolution. And we believe the resolution made by the Court of Claims was reasonable and consistent with the facts.

Contrary to petitioner's contention, the vagueness inherent in these preliminary writings is not clarified by the telephoned offer made by petitioner, in response to the invitation, of "one cargo per month" (Fndg. 2, R. 4; Pltf. Exs. 10, 11). Petitioner's negotiator who made that offer expressly admitted, and petitioner's counsel conceded, that the "one cargo per month" was merely a possible estimate of the amount which would be taken, and that he was aware of the Navy's custom of making open end contracts and conducted the negotiations

with that awareness (Tr. 531-532). Moreover, in making that offer, petitioner's negotiator made no mention of a limitation upon the period of delivery (Tr. 540-541, 654-656, 673-675). Plainly, therefore, the court did not err in turning to evidence of usage to determine the intent of the parties.

Alternatively, petitioner argues that the court's finding of an established usage is not supported by the evidence. This contention is not supported by the record. The testimony of the Government's witnesses clearly establishes their competence as expert witnesses on the question of usage and indisputably demonstrates its existence. Thus, Commander Drescher testified that he had been assigned duties relating to petroleum matters since 1938 and that he was Officer in Charge, Fuel Division, and Officer in Charge, Petroleum Section of the Purchasing Division of the Navy at the time here involved (Tr. 229-237). In that capacity, he had placed many nominations for vessels (Tr. 260-261), supervised the purchases of in excess of a hundred and fifty million dollars worth of petroleum products (Tr. 282-283), and personally compiled studies of the amount of petroleum products under contract, which analyzed the contracts with respect to the delivery obligations thereunder (Tr. 269-272, 277-281, 345-347, 363-365). Commander Drescher explained that it was customary to make contracts with an open end provision, as was done here, containing the words "in such quantities as may be

ordered", and that such contracts "remained in that status until a firm order was placed by the Government, at which time the quantities specified became fixed quantities, for which both parties to the contract were responsible to, on the one hand, accept, and, on the other hand, deliver." (Tr. 294). And that in contracts with such a standard provision, "the custom was to effect the deliveries as scheduled between the parties, irrespective of whether they came within the ordering period or subsequent thereto" (Tr. 296, 326, 350-351, 402-404). He further stated that, during his tenure of office, there had been no instances other than the case at bar where suppliers had contended that no obligation existed to deliver after the ordering period and that he knew of cases where deliveries were made in excess of 30 days after the ordering period without objection by the supplier (Tr. 296, 298-302). Corroboration of Commander Drescher's testimony was supplied by John Ryan, Acting Chief of the Petroleum Products Branch, Fuel Division, at the time of this contract, who similarly stated that, in his experience, there had been no other instances of refusal to deliver on orders placed within the contract period (Tr. 442).

Equally significant is the testimony of A. Boyd Custer, Special Assistant to the Officer in Charge, Procurement Division, Bureau of Supplies and Accounts, whose experience in this field dates back to 1911 (Tr. 455-456). Mr. Custer stated that it

has been the custom of the Navy, even before World War I, to procure petroleum products under open end contracts (Tr. 456), and that he assisted or wrote himself the clauses designed to accomplish the objective of providing contracts under which orders might be placed any time for delivery over a period of time (Tr. 457). "The only way that we deemed it feasible or practicable to have the literally hundreds of Naval activities that used those contracts completely and clearly informed of when one contract was available and the length of the period it was available was to make that on the basis of placing orders over a period and not for deliveries, because deliveries over a period would make all contracts uncertain." (Tr. 458). He testified specifically that it was the custom to make deliveries on the orders, regardless of when they were placed, as long as they were placed within the contract period (Tr. 462); that the custom was "known—well known to many of the members of the petroleum industry, if not all" (Tr. 460); and that he based that statement on his "constant conversation with the representatives of the various oil companies, by correspondence over a period of 30 years on that very subject, [and] by examination of the records of the deliveries under the contract." (Tr. 462). See also Tr. 469, 473-474.

Continuing, Mr. Custer stated that he had prepared a study of some 14 exhibits submitted by petitioner which summarized, for a period of years,

the contracts awarded, the names of the contractors, ordering period, and the date on which the last delivery was made under those contracts (Tr. 474-479). This analysis (Def. Ex. 23) reveals that during 1941-1942 there were 31 instances where petroleum products were delivered after the ordering period and that there were 13 such cases in 1947 and 1948.[2] In addition to this summary, Mr. Custer had also prepared a separate analysis of the Navy's dealings with petitioner. This further study was based on a group of negotiations which petitioner reported as illustrating the provisions of the invitations to bid and an independent group of contracts selected at random by one of Custer's assistants from a group of about 70 contracts with petitioner, two contracts being picked for each year (Tr. 479, 481-482). It showed that petitioner had delivered oil after the ordering period under one contract in 1941 (Tr. 482), under two contracts in 1942 (Tr. 482, 483-484), under one contract in 1943 (Tr. 481), in another instance in 1944 (Tr. 481), and as recently as November 1946 (Tr. 485)—four months prior to the execution of the contract herein—under an identical deliveries clause (Tr. 628).[3]

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[2] The exhibits submitted by petitioner did not cover the years 1943 through 1946.

[3] Petitioner's argument that the late deliveries in 1941 and 1942 are incompetent evidence of usage since they were made during the period of OPA price control and it was thus immaterial to the supplier whether the delivery period had expired, lacks force in view of the many deliveries referred to above which occurred after the expiration of price control on July 31, 1946.

Petitioner offered no evidence which showed that it, or other suppliers, had ever refused delivery after the expiration of an ordering period. Thus, petitioner's vice-president Wellemeyer stated only that he had never encountered a contract which specified a period within which orders could be placed for deliveries in a subsequent unlimited period (Tr. 570).[4] He did not testify, however, as to whether it was customary for deliveries to be made under Navy Contracts after the termination of the ordering period.[5] Similarly, although petitioner submitted some exhibits as purported proof, in a few instances, of a supposed different construction by the Navy because of the wording of some notices of award and other documents (Pet. 17), in none of those cases was any evidence offered by petitioner that, when an order was placed within the ordering period, delivery was not made after the expiration of the period. Moreover, those documents are simply evidence of the action contemplated by the Navy in those cases rather than the Navy's interpretation of the contract terms. Petitioner also relies on a few illustrative inter-departmental notices of award of other contracts transmitted by the Navy to the Department of Labor,

[4] In this connection, it should be noted that the Government contends only that deliveries may be made within a reasonable time after the ordering period and suggests no other custom (Tr. 474).

[5] It is pertinent to observe that petitioner's negotiator Bruggeman had previously been employed by the Joint Army-Navy Petroleum Purchasing Agency (Tr. 450, 661-663), and was conversant with Navy procurement custom (Tr. 551-552).

but not to the supplier, as showing a supposed contrary Navy interpretation of the contract provision in issue (Pet. 22). But, as the Government's witness Custer testified, the information in those reports did not manifest the Navy's construction of the dates of delivery. Because of the make-up of that form which was used to report contracts made under the Walsh-Healey Act, it was impractical for the Navy to describe accurately the exact details of the contracts, and the Department of Labor was furnished only a general report sufficient for its functions under the act (Tr. 640-646).

We submit, therefore, that the evidence fully supports the finding below of an established usage which was well known to the industry and to petitioner in particular. Moreover, apart from that evidence, it is clear from petitioner's conduct under the instant contract that it recognized the practice. On June 6, 1947, petitioner accepted the nomination of the S. S. Fort Frederica for lifting between June 17 and 19. On June 18, petitioner was advised that this vessel would be delayed until June 29. On June 23, it was again advised that the vessel would be delayed until July 2, and on June 26, that the tanker would not arrive until July 7. On July 8, the new date of July 10 was furnished, and on July 10, petitioner was informed that the vessel would be delayed indefinitely. At no time prior to July 22 did petitioner object to these notifications that delivery would be taken in July or definitely

refuse to load the Fort Frederica at the contract price (Fdngs. 5, 6, R. 6-8, Tr. 151-153, 175-179, 183, 217-219, 440-451; Def. Ex. 7). On June 11, the Navy placed an order for the remaining cargo, for lifting at a later date. The S.S. Fort Massaic was nominated on June 18 to lift this cargo on July 20. However, this nomination was cancelled on June 23 and the S. S. Port Republic substituted, on that date, for lifting on July 18. This substitution was confirmed in writing on July 3. Similarly, at no time prior to July 22 did petitioner object to these nominations for delivery in July or definitely refuse to load the Port Republic at the contract price (Fdngs. 5, 6, R. 6-8, Tr. 151-153, 175-179, 183, 217-219; Def. Exs. 5, 7). Plainly, therefore, the court below committed no error in finding that "plaintiff's conduct in this case showed a recognition of the custom." (R. 15).[6]

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[6] In this connection, it should be pointed out that no question of estoppel is involved in the instant case (Pet. 27). The Government did not argue below that petitioner had waived its rights or was estopped by its conduct but that the conduct of the parties demonstrated their intention, and interpretation of the contract, to establish an ordering period limited to June 30, rather than a delivery period ending June 30 (Def. Br. 75-80). When the court's opinion is read in this light, it is apparent that it did not invoke an estoppel.

This evidence as to usage and petitioner's knowledge thereof also serves to demonstrate that there is no merit to petitioner's argument that the contract expired upon the Navy's failure to lift the cargoes on July 10 and July 18, as previously scheduled (Pet. 23). There is nothing in the record which even suggests that time was of the essence and that nominations of vessels and dates could not be changed without breaching the contract. To the contrary, the uncontradicted testimony of the Government's witness Ryan is that the nomination

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY 1951.

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dates of vessels are frequently changed after the date has been furnished to the supplier (Tr. 454, 443-450). It is readily understandable, therefore, why the court below summarily rejected petitioner's assertion that the Navy did not, in fact, order the oil before June 30, stating (R. 15), "the ships that actually received the oil were nominated in June, and we think that the Navy ordered the oil in June."

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